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No. 80-5116

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS,

Plaintiff-Appellant,

vs.

LOU BREWER, Warden,

Defendant-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE JOHN HOWARD ASSOCIATION AND BRIEF OF THE JOHN HOWARD ASSOCIATION AS AMICUS CURIAE

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In the
Supreme Court of the United States

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No. 80-5116

DANE LAMAR JENKINS,
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vs.

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Defendant-Appellee.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE JOHN HOWARD ASSOCIATION

The John Howard Association hereby respectfully moves for leave to file the attached brief as *amicus curiae*. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested, but refused.

The John Howard Association ("Association") is a private, not-for-profit service agency engaged in monitoring penal institutions and correctional services in the United States. The Association is an advocate for fair and

efficient administration of criminal justice. The Association seeks improvement in the practices and procedures of the criminal justice system and guards against the erosion of prisoners' civil rights.

The Association has an interest in this case because the decision of the Court of Appeals greatly effects the manner in which prisoners may bring §1983 actions to redress deprivations of constitutional rights and because the affirmance of the decision below would overrule twenty years of civil rights precedent and a dozen Supreme Court decisions and would contravene Congress' intent dealing with prisoners' rights.

The Association seeks to file a brief as *amicus curiae* because it wishes to advance additional arguments in support of petitioner's request that the dismissal of his claims under §1983 be vacated and that the Seventh Circuit's rule requiring prior exhaustion of administrative remedies for prisoners' §1983 actions alleging deprivation of property "of no great monetary value" be reversed.

For the foregoing reasons, the Association respectfully requests that it be granted leave to file the attached brief.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE JOHN HOWARD ASSOCIATION AS AMICUS CURIAE

STATEMENT OF INTEREST

The John Howard Association ("Association") is a private, not-for-profit service agency engaged in monitoring penal institutions and correctional services in the United States. The Association is an advocate for fair

and efficient administration of criminal justice. The Association seeks improvement in the practices and procedures of the criminal justice system and guards against the erosion of prisoners' civil rights.

The Association has an interest in this case because it presents an important prisoner's civil rights issue: whether prisoners must exhaust their state administrative remedies before bringing actions under §1983 for deprivation of property without due process of law. The Association also has an interest in commenting on the effectiveness of the current administrative review procedure in the Illinois Stateville Correctional Center.

This brief is submitted in support of the petitioner's position.

SUMMARY OF ARGUMENT

In this case, the Seventh Circuit held that prior to bringing §1983 actions to redress the deprivation of civil rights, prisoners must exhaust their administrative remedies. To affirm that decision, this Court would have to overrule a long line of Supreme Court precedents which have consistently held that there is no exhaustion requirement for §1983 cases. Moreover, this Court has never recognized but has specifically rejected any exception to the no-exhaustion rule based on prisoner status or amount in controversy. Additionally, requiring exhaustion would directly contravene Congress' intent in providing a federal remedy for civil rights violations and would severely prejudice prisoners' rights. Finally, if exhaustion is required, it can only be required where the administrative remedies are adequate and the administrative review procedures at Illinois' Stateville Correctional Center are hopelessly inadequate.

ARGUMENT

I.

Twenty Years Of Precedent And A Dozen Supreme Court Decisions Must Be Overruled If This Court Is To Affirm The Decision Below.

Over the last twenty years, and in numerous settings, this Court has consistently held that §1983 suits may be maintained by an aggrieved person without first seeking or exhausting state judicial or administrative remedies. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961) (unreasonable search and seizure), *overruled on other grounds, Monell* v. *Department of Social Services,* 436 U.S. 658 (1978); *McNeese* v. *Board of Education,* 373 U.S. 668, 672 (1963) (unconstitutional assignment of public school students to classrooms on a racial basis); *Damico* v. *California,* 389 U.S. 416, 417 (1967) (welfare regulations); *King* v. *Smith,* 392 U.S. 309, 312 (1968) (aid to dependent children regulations); *Carter* v. *Stanton,* 405 U.S. 669, 671 (1972) (state welfare regulations); *Metcalf* v. *Swank,* 406 U.S. 914 (1972) (state welfare regulations); *Gibson* v. *Berryhill,* 411 U.S. 564, 574 (1973) (licensing revocation proceeding); *Steffel* v. *Thompson* 415 U.S. 452, 472-73 (1974) (public handbilling); and *Ellis* v. *Dyson,* 421 U.S. 426, 432-33 (1975) (loitering ordinance).

This Court has applied the no exhaustion rule in numerous cases involving claims by prisoners under §1983. In *Houghton* v. *Shafer,* 392 U.S. 639, 640 (1968), a case very similar to the instant case, this Court held that a prisoner challenging the confiscation of his legal materials need not exhaust prison administrative remedies

as a condition of bringing a §1983 suit. In *Wilwording* v. *Swenson,* 404 U.S. 249, 251 (1971), this Court held that prisoners were entitled to maintain federal habeas corpus actions for deprivation of constitutional rights as claims under §1983 and thereby avoid the habeas corpus exhaustion requirement. In addition, in *Preiser* v. *Rodriguez,* 411 U.S. 475, 494 (1973), this Court ruled that prisoners may bring §1983 actions to remedy the conditions of their confinement without prior exhaustion of state remedies.

For this Court now to affirm the Seventh Circuit and rule that prisoners must exhaust administrative remedies before bringing actions in federal court to seek redress for the deprivation of their constitutional rights would be contrary to every one of this Court's well-reasoned precedents and would violate the long established principle of *stare decisis.* None of the factors which might justify overturning a long line of cases construing civil rights legislation apply to the twelve civil rights decisions cited above. *See Monell* v. *Department of Social Services,* 436 U.S. 658, 695-701, 709 (1978).

This Court should not, therefore, turn its back on its prior decisions and, for the sake of convenience, deny prisoners a federal forum for protecting their constitutional rights under §1983.

II.

The Relevant Supreme Court Decisions Preclude An Exception To The No Exhaustion Rule In §1983 Cases Based On The Prisoner Status Of The Plaintiff Or The Amount In Controversy.

In granting defendant's motion to dismiss this case, the trial court held that the decision of the Seventh Circuit in *Secret* v. *Brierton,* 584 F.2d 823 (7th Cir. 1978), "directly controls this case. Exhaustion of administrative reme-

dies is required in prisoner §1983 cases which allege deprivation without due process of tangible items of personal property of no great monetary value. 584 F.2d at 829." Memorandum Opinion and Order of October 24, 1972, at 2. In affirming the dismissal, the Seventh Circuit stated: "[W]e agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by *Secret* v. *Brierton* [citation omitted]." Order of June 20, 1980.

In the *Secret* case, the Seventh Circuit gave a narrow and unnatural reading to this Court's precedents in attempting to carve out an exception to the well established rule of this Court concerning exhaustion in §1983 cases.[1] The Seventh Circuit conceded that it could not find any support for its decision from the relevant Supreme Court cases, but explained its unprecedented decision by stating that "[w]e suggest only that these opinions do not preclude our decision in the present case." 584 F.2d at 828. The Seventh Circuit said that it would confine its holding "to prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829.

A. Prisoner Status Is Not A Justification For Imposing An Exhaustion Requirement.

The Seventh Circuit based its new exhaustion rule in §1983 cases in part on a distinction between prisoners and other §1983 plaintiffs. This approach is directly con-

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[1] Until the decision in *Secret*, the Seventh Circuit followed the principle laid down by this Court that exhaustion of administrative remedies is not required. *See Nickerson* v. *Thomson*, 504 F.2d 813, 817 (7th Cir. 1974); *Brooks* v. *Center Township*, 485 F.2d 383, 386 (7th Cir. 1973).

trary to this Court's rulings in *Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968), *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971), and *Preiser* v. *Rodriguez*, 411 U.S. 475, 494 (1973).

A distinction between prisoners and other §1983 litigants is not a legitimate basis for establishing an exception to the no exhaustion rule. This distinction was explicitly considered and rejected by this Court in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971).[2]

In *Wilwording*, a district court dismissed a prisoners' §1983 complaint on the ground that the plaintiff prisoners had neither exhausted their state judicial remedies nor sought relief that was available to them under their state's administrative procedure act. 404 U.S. at 249-50. The Court of Appeals affirmed the dismissal. This Court reversed, holding that exhaustion of state remedies was not required because "prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U.S. at 251. This Court also noted that the efficacy of any available state remedy was immaterial because "in 'any event, resort to these remedies is unnecessary.' " 404 U.S. at 252, *quoting Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968).

The Seventh Circuit's opinion in *Secret* attempts to narrow this Court's decision in *Wilwording* by baldly asserting that only judicial remedies were actually involved in that case and that "any intimation of an inflexible rule against exhaustion of state administrative remedies was dicta." 584 F.2d at 827. That assertion is simply incorrect.

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[2] As well as being inconsistent with previous decisions of this Court, the Seventh Circuit's distinction raises additional and serious equal protection questions under the fourteenth amendment. *See Reed* v. *Reed*, 404 U.S. 71 (1971).

This Court unambiguously stated that the complaint in *Wilwording* had been dismissed because plaintiffs had failed to exhaust state judicial *and* administrative remedies. 404 U.S. at 249-50. Thus, in reversing that dismissal order, this Court held that exhaustion of administrative remedies was not required. If the ruling of this Court was otherwise, this Court would have affirmed the decision of the lower court because the prisoners had failed to exhaust their state administrative remedies.

Far from being *dicta,* the holding in *Wilwording* was both consistent with, and required by, this Court's prior decisions. In *Houghton* v. *Shafer,* 392 U.S. 639 (1968), for example, this Court reversed the decision of a lower court which had dismissed a prisoner's civil rights action for failure to exhaust administrative remedies. After discussing the adequacy of the relief that might have been administratively available, the Court concluded that "in any event resort to these remedies is unnecessary." 392 U.S. at 640.

B. Lack of Great Monetary Value Is Not A Justification For Requiring Exhaustion.

The Seventh Circuit in *Secret* also based its newly created exhaustion rule in §1983 cases on the value of the personal property involved. 584 F.2d at 829. That portion of the Seventh Circuit's holding clearly is inconsistent with this Court's statement in *Goss* v. *Lopez,* 419 U.S. 565, 576 (1975), that "as long as property deprivation is not *de minimis,* its gravity is irrelevant." Moreover, in *Weddle* v. *Director, Patuxent Institution,* 405 U.S. 1036 (1972), *vacating* 436 F.2d 342 (4th Cir. 1970), this Court recognized that a state prisoner's claim for deprivation of property was cognizable under §1983 even when the property at

stake had an aggregate value of only $3.52.[3] In effect, the Seventh Circuit has legislated an amount in controversy requirement, which Congress has not seen fit to impose in civil rights cases, even though, as noted *infra* at 14-16, it has specifically addressed the matter.

While the Seventh Circuit's decision in *Secret* was obviously motivated by a concern that frivolous complaints should be removed from the federal docket, the court's attempt to weed out frivolous complaints by considering only the monetary value of the property involved is neither workable nor based on a realistic assessment of the interest involved. Rather than eliminating frivolous §1983 cases, the vagueness of the court's standard—"property of no great monetary value"—can only generate further layers of appeals in §1983 cases, because the district courts must decide whether particular property such as books, papers and other personal possessions have "no great monetary value."

The decision of the Seventh Circuit in *Secret* attempts to distinguish between liberty and property interests for exhaustion purposes. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), this Court held that §1983 affords protection to *both* liberty and property interests on equal footing.

The Seventh Circuit in *Secret* failed to recognize that liberty interests necessarily are interwoven with property interests, and thus different treatment cannot be given to each. This is especially true when the property in-

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[3] In *Russell* v. *Bodner*, 489 F.2d 280 (3d Cir. 1973), the court refused to dismiss a §1983 action where the property involved was seven packages of cigarettes. The court flatly stated: "The value of the cigarettes is not determinative of the federal court's jurisdiction in a Civil Rights Act case." 489 F.2d at 281.

volved is books, papers and legal documents.[4] It has long been recognized that prisoners have a special interest in their transcripts, legal papers, and research books. *See, e.g., Griffin* v. *Illinois,* 351 U.S. 12, 19 (1956); *Bounds* v. *Smith,* 430 U.S. 817, 824-25, 828 (1976). State action depriving a prisoner of his legal books and papers violates not only a property right, but a liberty interest as well. As this Court held in *Bounds* v. *Smith, supra:* "It is now established beyond doubt that prisoners have a constitutional right of access to the courts," 430 U.S. at 821, and that legal papers and research books play a major role in that liberty interest.

Justice Stevens has wisely suggested that the value of property to a prisoner may be "disproportionate to [its] price on the open market." *Bonner* v. *Coughlin,* 517 F.2d 1311, 1314 (7th Cir. 1975), *rev'd in part on other grounds* 545 F.2d 565 (7th Cir. 1976) (en banc), *cert. denied* 435 U.S. 932 (1978). This concept is underscored when considered in light of the general principle that a prisoner's right to possess property is necessarily limited by his incarceration. *See Secret* v. *Brierton, supra,* 584 F.2d at 830. Thus, the few possessions a prisoner has a legal right to keep take on special significance and added value.

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[4] Included in the list of personal property items taken from the Petitioner are "Legal Correspondence, Personal Correspondence, Numerous Motions, Two Transcripts, Post-Conviction Petition, . . . 1 Dictionary, . . . 3 Law Books, . . . 8 Text Books" and assorted other communicative materials. Affidavit of Dane Lamar Jenkins. By requiring the Petitioner to exhaust his administrative remedies in this case, the Seventh Circuit has concluded that "property of no great monetary value" necessarily encompasses a prisoner's books and papers—those items of personal property that civilized society has particularly cherished from earliest times, and to which our constitutional tradition has always afforded special consideration. *See Boyd* v. *United States,* 116 U.S. 616 (1886).

A legal standard based upon the value of property in §1983 cases is, therefore, unworkable and unjustified.

C. Other Circuits Consistently Have Rejected The Justifications For Exhaustion Offered By The Seventh Circuit.

The artificial distinctions of Supreme Court precedent that were accepted by the Seventh Circuit in *Secret* and applied in this case have been repeatedly rejected by other Courts of Appeal.

In *McCray* v. *Burrell,* 516 F.2d 357 (1975), *cert. dismissed as improvidently granted,* 426 U.S. 471 (1976), the Fourth Circuit *en banc* confronted the argument that a state prisoner must exhaust available administrative remedies before a federal district court can adjudicate his claim under §1983. *Burrell,* like *Secret,* attempted to distinguish *McNeese, Houghton, Wilwording,* and similar Supreme Court cases. 516 F.2d at 362. The Fourth Circuit concluded after a "survey . . . of the pertinent authorities" that "the law would appear overwhelming that exhaustion of available state administrative remedies is not a prerequisite" to a federal suit and therefore refused to dismiss claims by prisoners. 516 F.2d at 363.

The Third, Fifth, Sixth and Eighth Circuits also have squarely addressed the question of whether state prisoners must exhaust administrative remedies and have reached the same result. *United States ex rel. Ricketts* v. *Lightcap,* 567 F.2d 1226 (3d Cir. 1977); *Hardwick* v. *Ault,* 517 F.2d 295 (5th Cir. 1975); *Jones* v. *Metzger,* 456 F.2d 854 (6th Cir. 1972); *McClelland* v. *Sigler,* 456 F.2d 1266 (8th Cir. 1972). In so holding, those Courts of Appeal have specifically recognized that prisoners cannot be subjected to stricter requirements than other litigants, *see, e.g., Jones*

v. *Metzger,* 456 F.2d at 856, and have applied the non-exhaustion rule to cases involving property claims by prisoners. *See, e.g., Bryant* v. *Potts,* 528 F.2d 621 (5th Cir. 1976).

Only two Circuits, the Second and the Ninth, have deviated from this firm no-exhaustion position; even those Circuits would not have required exhaustion in this case. The Ninth Circuit requires exhaustion only when the remedy sought is prospective. *See Toney* v. *Reagan,* 467 F.2d 953 (9th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973). Because the plaintiff in this case has requested "relief from" and "compensation for, a deprivation of civil rights which ha[s] already occurred," no exhaustion would be necessary in the Ninth Circuit. *Canton* v. *Spokane School District #81,* 498 F.2d 840, 844 (9th Cir. 1974). While the Second Circuit, "albeit with some hesitation," *Fuentes* v. *Roher,* 519 F.2d 379, 386 (2d Cir. 1975), has articulated an exhaustion requirement based upon adequacy, its standard for determining whether the remedy is adequate clearly has not been satisfied in this case and thus, under the Second Circuit precedent, this case would not require prior exhaustion. *See* Section V *infra.*

III.

To Require Exhaustion of Administrative Remedies Would Contravene Congress' Intent.

Requiring plaintiffs in §1983 actions to exhaust their administrative remedies is contrary to Congress' intent in creating and maintaining a separate, independent federal remedy for the vindication of civil rights violations. Congress, in enacting §1983, did not trust the States to protect federal constitutional rights, and thus gave federal courts the power to protect those rights without prior

resort to state remedies.[5] This Court has found this to be Congress' intent on several occasions. *See, e.g., Monroe* v. *Pape,* 365 U.S. 167, 171-84 (1961), *overruled on other grounds, Monell* v. *Department of Social Services,* 436 U.S. 658 (1978); *McNeese* v. *Board of Education,* 373 U.S. 668, 671-72 (1963).

In enacting §1983, Congress intended that the protection of federal rights not be made to depend upon any state remedies, either judicial or administrative, whether available or adequate, in theory or in practice. *Mitchum* v. *Foster,* 407 U.S. 225, 239-42 (1972); *Zwickler* v. *Koota,* 389 U.S. 241, 245-47 (1967). "By that statute '. . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts . . . became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Zwickler* v. *Koota,* 389 U.S. 241, 247 (1967), quoting Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (emphasis added by the Court).

The specific intent of Congress has most recently been expressed in the adoption of 42 U.S.C. §1997e.[6] That section

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[5] In response to the reign of terror and violence conducted by the Klu Klux Klan following the Civil War, President Grant asked Congress for legislation to alleviate the problem. *District of Columbia* v. *Carter,* 409 U.S. 418, 426-29 (1973). Congress responded with §1 of the Klu Klux Klan Act of 1871, Act of April 20, 1871, §1, 17 Stat. 13. The Act was later codified as 42 U.S.C. §1979, and later, as 42 U.S.C. §1983. No major revisions occurred with either codification.

[6] If Congress had wished to burden access to the Courts in this area with an exhaustion requirement it would have done so explicitly as it did in 28 U.S.C. § 2254, which requires exhaustion before seeking Federal habeas corpus. Given Congress' clear decision not to burden §1983 with a similar exhaustion requirement, it would be an impermissible exercise of judicial law-making for this Court to legislate in the area.

provides that in any action brought under §1983 by an incarcerated adult, "the Court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available."[7] Thus, Congress specifically addressed the subject of exhaustion of administrative remedies by prisoners suing under §1983 and chose not to condition the right to sue upon exhaustion. Instead, Congress has recognized the federal court's proper jurisdiction of prisoner §1983 suits and authorized Federal Courts to require exhaustion only by continuing the case for 90 days or less —not by dismissal for lack of jurisdiction.

Moreover, the section further provides that a court may not continue a case to require exhaustion "unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section." 42 U.S.C. §1997e(a)(2).

Under §1997e(b) the Attorney General is to promulgate standards which shall at a minimum provide:

> "(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

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[7] This statute, Pub. L. 96-247, §7, 94 Stat. 352, was adopted on May 23, 1980. It is applicable to the instant case because its enactment precedes final ruling by this Court. *See*, e.g., *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975).

"(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

"(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

"(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

"(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution."

The Attorney General has not certified nor has any court determined that the administrative review procedures in effect for the Stateville Correctional Center are in substantial compliance with the minimum safeguards established by Congress in §1997e. Therefore, this Court should reverse the dismissal of Petitioner's claims for failure to exhaust administrative remedies.

IV.

A Requirement That Prisoners Exhaust A State Administrative Remedy In §1983 Cases Will Severely Prejudice Prisoners' Rights And Will Not Enhance The Administration Of Justice.

In the past, state prison officials have been openly hostile to prison reforms and to vindication of federal civil rights. While not all prison officials share this hostility, institutional factors remain which make a federal forum desirable. The prison administrator hearing

a complaint which might give rise to a §1983 action must assess the propriety of the state and prison regulations of which he or she is a part. Prison officials under those circumstances may find it difficult to assess damages against other prison officials even if authorized to do so.[8] Federal judges are not susceptible to these parochial pressures. Federal remedial and procedural tools are, therefore, likely to be more effective in enforcing federal rights than State administrative remedies. For example, exhaustion of state administrative remedies even though it would otherwise be appropriate, is never required where the plaintiff raises issues beyond the expertise of state administrative agencies. *Plano* v. *Baker,* 504 F.2d 595 (2d Cir. 1974) (first amendment issues); *Green* v. *Ten Eyck,* 572 F.2d 1233 (8th Cir. 1978) (right to nondiscriminatory housing).[9] Given Congress' intent to provide a uniquely federal remedy for §1983 violations, all issues attendant to a prisoner's claim for deprivation of his civil rights are likely to be beyond the authority or expertise of prison grievance committee members and are best left to the expertise of the federal courts.

The delays inherent in prisoner grievance proceedings are severe. The Illinois procedures, for example, do not provide time limits within which the review process must be completed. The internal grievance procedure could stretch for months or even years. Requiring the exhaustion of administrative remedies will not lighten the

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[8] The Stateville Internal Grievance Procedures do not include the authority to assess damages.

[9] In the case at bar the plaintiff's items of personal property included legal documents, books, paper and pens and other communicative materials. Affidavit of Dane Lamar Jenkins. The nature of these materials suggests that if the district court had allowed the case to go forward, issues such as the right of access to the courts and the right to free expression of ideas might have been developed. These issues are beyond the expertise of State administrative agencies.

work of the federal district courts. Suits brought under §1983 are not reviews of administrative action. They are cases of first impression with original jurisdiction in the district courts. 28 U.S.C. §1343. Any testimony or written records developed by an administrative agency would have no meaning in the federal action. The administrative grievance procedures would, thus, add considerable delay to the resolution of deprivations of constitutional rights without any overriding societal benefits.

Not only does an administrative exhaustion requirement impose undue delay, but it also creates a more invidious problem. The underlying assumption is that resort to an administrative grievance procedure would not deprive a prisoner of an opportunity to air his complaint before a federal court. *See Secret* v. *Brierton,* 584 F.2d 823, 828 (7th Cir. 1978). However, this Court has held that state statutes of limitations and the coordinate state tolling rules govern the time for filing §1983 actions. *Board of Regents* v. *Tomanio,* 446 U.S. 478, 100 S. Ct. 1790, 1794 (1980). In *Tomanio,* the filing of a state court claim did not toll the running of the limitation period for filing a federal §1983 claim. 100 S.Ct. at 1799. This leads to the incongrous result that in some jurisdictions the time required for exhaustion of administrative remedies will preclude timely filing of prisoners' claims under §1983. Thus the courthouse door would be completely closed to certain prisoners' §1983 claims.

An entire class of persons, such as prisoners, should not be excluded from court merely because some future litigant might assert a frivolous claim. This court rejected this "frivolity" argument in *Boddie* v. *Connecticut,* 401 U.S. 371, 381-82 (1971), and suggested an alternate remedy of imposing sanctions in specific lawsuits rather than barring the litigation wholesale. Courts "must not play

fast and loose with basic constitutional rights in the interest of administrative efficiency. [Citation omitted]." *Sewell* v. *Pegelow,* 291 F.2d 196, 198 (4th Cir. 1961). Although judicial resources are increasingly scarce, that is not a reason for denying an individual or a class of individuals a forum for protecting their constitutional rights. *See, Bivens* v. *Six Unknown Agents,* 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

V.

If Exhaustion Is Required, This Court Must Correct The Seventh Circuit's Approval Of Illinois' Hopelessly Inadequate Procedures.

If exhaustion is required, it can only be required where the administrative remedies are adequate. The internal grievance procedures at Illinois' Stateville Correctional Center are hopelessly inadequate.

The district court below in an opinion adopted by the Court of Appeals stated: "In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in *Secret, id.* at 832, and that petitioner has put forward no reasons why it should be considered 'inherently unfair,' this court cannot say that such an appeal would have been futile." Memorandum Opinion and Order of October 24, 1979 at 2. In the *Secret* case, the Seventh Circuit declared, without any evidentiary hearing, that Stateville's administrative procedures were adequate because they were "capable" of providing the remedy sought in a reasonable time and were not "so inherently unfair that utilization of them would be futile." 584 F.2d at 831. In so holding, the Seventh Circuit applied a standard considerably more lax than the standard mandated by this Court and the standard consistently applied by other Circuits when administrative exhaustion has been required.

Contrary to the Seventh Circuit's impression (584 F.2d at 831), there is not an absence of case law guidance on the types of procedures necessary to qualify an administrative remedy as adequate. Most notably, the Second Circuit already has held that administrative review proceedings must provide the following opportunities in order to be deemed a prerequisite to a federal court action:

> The right to hear and refute evidence presented against oneself, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal would most likely be the components of an administrative procedure sufficiently adequate to require exhaustion prior to commencing a suit under Section 1983 to vindicate the interference with a constitutional right. *Plano* v. *Baker*, 504 F.2d 595, 598 (2d Cir. 1974), quoting *Hayes* v. *Cape Henlopen School District*, 341 F. Supp. 823, 831 (D. Del. 1972).[10]

Accord Gonzalez v. *Shanker*, 533 F.2d 832 (2d Cir. 1976).

The Stateville procedures only provide a prisoner with an opportunity to appear before the Institutional Inquiry Board and to write an appeal to the Director of Corrections. The prisoner has no right to present evidence or call witnesses. He has no right to be present when witnesses

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[10] If any distinction is to be made between the teachers involved in *Plano* and the prisoners involved in this case, it should recognize the prisoners' greater need for procedural protections. Unlike teachers, who have a bargaining lever due to their ability to work elsewhere, prisoners are powerless. *Cf. Wolff* v. *McDonnell*, 418 U.S. 539, 562 (1974). Similarly, prisoner plaintiffs need greater protection because they are likely to be less educated and do not have the luxury of appearing before their peers. *See Toney* v. *Reagan*, 467 F.2d 953, 958 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

are called. Rather than providing an "adequate" remedy sufficient to justify a temporary closing of the federal courthouse door, these procedures do not even satisfy minimum due process standards. *See Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

An equally glaring inadequacy is that the grievance procedures do not provide for an award of damages, which plaintiff requested in his complaint in the district court. Exhaustion has never been required when the administrative officials are not empowered to grant the relief sought. *Green* v. *Ten Eyck*, 572 F.2d 1233, 1240 (8th Cir. 1978); *Ray* v. *Fritz*, 468 F.2d 586, 587 (2d Cir. 1972). Moreover, before §1983 jurisdiction can be relinquished, the court must be "positively assured—it may not presume—that there are speedy, sufficient and readily available administrative remedies. . . ." *Morgan* v. *La Vallee*, 526 F.2d 221, 224 (2d Cir. 1975).

Bias of the decisionmakers is a third inadequacy of the Illinois procedures. While the regulations create an Institutional Inquiry Board and an Administrative Review Board, both in effect are advisory only and the Chief Administrative Officer or the Director of Corrections will make all final decisions. Both the Chief Administrative Officer and the Director of Corrections are hopelessly biased under the precedents of this Court. The Chief Administrative Officer is sued for damages individually and therefore has a direct pecuniary interest, disqualifying him under *Gibson* v. *Berryhill*, 411 U.S. 564, 571, 578-79 (1973). The Director of Corrections wrote the policy forbidding plaintiff from keeping the property that forms the basis of

plaintiff's complaint, and the Director is responsible for the finances of the Department of Corrections. His role in the formation of the policy renders him incompetent because he has prejudged the issues, *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *Fuentes* v. *Roher*, 519 F.2d 379, 387 (2d Cir. 1975), and his fiscal responsibilities create an interest that is more than sufficient to deprive him of impartiality. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

In accepting the Illinois procedures because they theoretically provide some remedy and are not so unfair as to be futile, the Seventh Circuit in *Secret* applied some but not all of the accepted standards for determining the adequacy of administrative remedies.[11] It therefore required exhaustion of state remedies which failed to satisfy three of the most elementary requirements of an adequate procedure: an opportunity to present a case, to obtain the relief desired, and to be judged by an impartial decisionmaker.

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[11] The Illinois procedures also are inadequate because no time limit is provided for either of the two required determinations by the Director of Corrections. In the absence of evidence establishing prompt handling of complaints, this opportunity for delay renders the state remedy inadequate. *See Gibson* v. *Berryhill*, 411 U.S. at 575 n.18; *Green* v. *Ten Eyck*, 572 F.2d 1233, 1240 (8th Cir. 1978) (appeal hearing within a "reasonable time" held inadequate); *Morgan* v. *LaVallee*, 526 F.2d 221 (2d Cir. 1975). Further, only the advisory bodies, the Institutional Inquiry Board and the Administrative Review Board, are required to provide the inmate with their reasons for decision. Because the real decisionmakers are not required to offer their grounds for decision, Illinois' procedures fail to satisfy the requirements of *Wolff* v. *McDonnell*, 418 U.S. at 565. *See Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. 1975).

CONCLUSION

For all of the reasons stated, *amicus* respectfully urges this Court to reverse the decision below holding that exhaustion of administrative remedies is required by prisoners before bringing an action under §1983.

Respectfully submitted,

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